Network Capital Funding Corporation *and* Erik Papke. Case 21–CA–107219

February 18, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On March 5, 2014, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an Employee Acknowledgment and Agreement (the Agreement) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decisions in *Murphy Oil* and *Countrywide Financial Corp.,* 362 NLRB No. 165 (2015), we affirm the judge's rulings, findings,[1] and conclusions,[2] and adopt the recommended Order as modified and set forth in full below.[3]

In affirming the judge's unfair labor practice findings, we observe that the judge correctly found that signing the Respondent's Agreement was a mandatory condition of employment. At an orientation session for newly hired employees, the Respondent's representative distributed copies of the Agreement, along with other forms, for

[1] Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2 and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 fn. 2. But what our colleague ignores is that the Act does "create[] a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2. The Respondent's Agreement is just such an unlawful restraint.

[2] We agree with the judge that, although the Agreement is silent on whether employees can arbitrate claims on a class or collective basis, the Respondent interpreted and applied the Agreement to restrict all employment disputes to individual arbitration, in violation of Sec. 8(a)(1). See *Countrywide*, 362 NLRB No. 165, slip op. at 3–4. Moreover, the Respondent did not except to the judge's finding that the Agreement effectively barred class or collective employee actions in any forum and that employees would reasonably read it to that effect.

The Respondent argues that the complaint is time barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Erik Papke, signed and became subject to the Agreement. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful Agreement during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's Agreement, constitutes a continuing violation that is not time-barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the Agreement here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra, at 19–21. The Respondent enforced its Agreement on June 11, 2013, within the relevant 6-month period before the charge was filed and served.

The Respondent also argues that its Agreement includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton,* unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. We reject this argument for the reasons given in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

[3] Because the lawsuit has been dismissed, we find it unnecessary to order the Respondent, as in *Murphy Oil* (slip op. at 21–22), to remedy the 8(a)(1) enforcement violation by notifying the court that it no longer opposes Papke's lawsuit. However, consistent with our decision in *Murphy Oil*, supra at 21, we clarify the judge's remedy by ordering the Respondent to reimburse Papke and all other plaintiffs, if any, for all reasonable expenses and legal fees, with interest, incurred in responding to the Respondent's unlawful motion in State court to compel individual arbitration and dismiss the class action lawsuit. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid*), 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

We reject our dissenting colleague's view that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, supra, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

Finally, we modify the judge's recommended Order to conform to the Amended Remedy, to the judge's unfair labor practice findings, and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Papke and eight other newly hired loan officers "to sign" and submit to the presenter. As found by the judge, the presenter did not indicate in any way that the employees could remain employed without signing the Agreement. Further, we find it significant that the purpose of the orientation session was to instruct new hires on the Respondent's required operating procedures. In this context, Papke and the other employees present would reasonably have believed that signing the Agreement was a condition of their employment.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Network Capital Funding Corporation, Irvine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing an Employee Acknowledgment and Agreement (the Agreement that requires employees, as a condition of employment, to waive the right to maintain joint, class, or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Rescind the Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign the Agreement in any form that the agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement, and further notify them that the Agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

(c) In the manner set forth in the remedy section of this decision, reimburse Erik Papke and any other plaintiffs for any reasonable attorneys' fees and litigation expenses they may have incurred in responding to the Respondent's motion to compel individual arbitration and strike class allegations in *Erik Papke v. Network Capital Funding Corp.*

(d) Within 14 days after service by the Region, post at its Irvine, California facility, copies of the notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 11, 2013, and any employees and former employees against whom the Respondent has enforced the Agreement since December 13, 2012.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 18, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

[4] In any event, we would find that the Respondent's maintenance and enforcement of the Agreement unlawful even if executing the Agreement was not a mandatory condition of employment. See *On Assignment Staffing Services, Inc.,* 362 NLRB No. 189 (2015).

We also agree with the judge that neither Papke's voluntary motion to dismiss his state lawsuit nor his subsequent demand for class arbitration constituted a waiver of any of his rights under the Act. See *Bethenergy Mines,* 308 NLRB 1242, 1245–1246 (1992) (an employee's waiver of a Sec. 7 right must be clear and unmistakable, citing *Metropolitan Edison v. NLRB,* 460 U.S. 693 (1983)); *Electrical Workers IBEW Local 2008*, 302 NLRB 322, 331 (1991) (same).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

In this case, my colleagues find that the Respondent's Employee Acknowledgement and Agreement (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Erik Papke signed the Agreement, and later he filed a class action lawsuit against the Respondent in State court alleging violations of the California Labor Code. In reliance on the Agreement, the Respondent filed a motion to compel arbitration on an individual basis.[1] My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[2]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[3] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[6] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] Although questions may arise regarding the enforceability of particular agreements that waive

---

[1] Following the Respondent's motion to compel arbitration, Papke filed a request to dismiss his lawsuit, which the court granted. Papke then filed a demand for class arbitration of the same claims previously asserted in his lawsuit. The Respondent filed a complaint for declaratory and injunctive relief in State court and moved for a preliminary injunction against Papke's class arbitration demand. The court granted the Respondent's motion, finding that Papke's claims must proceed on an individual basis. Papke appealed the court's order, and his appeal remains pending in the California courts. See *Network Capital Funding Corp. v. Papke*, 230 Cal.App. 4th 503 (Cal. Ct. App. 4th Dist. 2014) (denying appeal), review granted 340 P.3d 1043 (Cal. 2015).

[2] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. 2015).

[3] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[4] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.,* 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services,* No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[7] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[8]

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in State court seeking to enforce the Agreement.[9] That the Respondent's motion was reasonably based is supported by court decisions that have enforced similar agreements.[10] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[11] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party or any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 18, 2015

Philip A. Miscimarra Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an Employee Acknowledgment and Agreement (the Agreement) that requires our employees, as a condition of employment, to waive the right to maintain employment-related joint, class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

[8] For the reasons expressed in my dissenting opinion in *Bristol Farms*, 363 NLRB No. 45, slip op. at 2–4 (2015), I believe that an agreement to arbitrate disputes is lawful regardless of whether it is a condition of employment or continued employment. Accordingly, I do not reach the issue of whether the Agreement at issue here was a condition of employment.

Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB 2277 (2012), enf. denied in pertinent part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB 2277, 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

[9] As noted, the Charging Party did not oppose the motion to compel arbitration but instead voluntarily dismissed his lawsuit and filed a demand for class arbitration. I do not understand the majority to find that the Respondent violated the Act by filing a complaint for declaratory and injunctive relief in state court and moving for a preliminary injunction against the Charging Party's class arbitration demand, or to award attorneys' fees to the Charging Party or any other party for opposing that motion. Any such finding would be unwarranted in any event. The Agreement furnishes no basis for a conclusion that the Respondent agreed to arbitrate employment-related disputes on a class basis, and the Supreme Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen S.A. v. Animal Feeds International Corp.,* 559 U.S. 662, 684–685 (2010) (emphasis in original). Thus, the Respondent's motion to compel individual arbitration was "well-founded in the FAA as authoritatively interpreted by the Supreme Court." *Philmar Care, LLC*, 363 NLRB No. 57, slip op. at 4 fn. 11 (2015) (Member Miscimarra, dissenting); see also *Countrywide Financial Corp.,* 362 NLRB No. 165, slip op. at 9 (2015) (Member Johnson, dissenting).

[10] See, e.g., *Murphy Oil, Inc., USA v. NLRB,* above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[11] *Murphy Oil, Inc., USA v. NLRB*, above at fn. 6.

WE WILL rescind the Agreement or revise it in all of its forms to make clear that it does not restrict your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the Agreement in all of its forms that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised Agreement.

WE WILL reimburse Papke and any other plaintiffs for reasonable attorneys' fees and litigation expenses incurred, with interest, in responding to our motion to compel individual arbitration and dismiss class action allegations.

NETWORK CAPITAL FUNDING CORPORATION

The Board's decision can be found at www.nlrb.gov/case/21–CA–107219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Jean C. Libby, Esq., for the Government.[1]
Lonnie D. Giamela, Esq., for the Company.[2]
John Glugoski, Esq., for the Charging Party.[3]

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me on December 16, 2013, in Los Angeles, California. Charging Party Papke filed the charge initiating this matter on June 13, 2013, and the General Counsel issued a complaint and notice of hearing (complaint) on August 30, 2013. The Government alleges the Company, since on or about December 14, 2012, has maintained an Employee Acknowledgement and Agreement (Agreement) which contains provisions that require employees to utilize binding arbitration to resolve all disputes that may arise out of or be related to their employment. It is also alleged the Company, on or about October 25, 2011, required Charging Party Papke to sign the Agreement as a condition of his employment. It is further alleged that on or about June 11, 2013, the Company has sought to enforce the Agreement by filing a Motion to Compel Arbitration on an Individual Basis in a class action complaint filed against the Company by Charging Party Papke in *Erik Papke v. Network Capital Funding Corp.,* Case No. 30–2013–0063857–CU–OE–CXC in Superior Court of California, County of Orange. The Government alleges, that by the conduct just described, the Company has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act (the Act) and is in violation of Section (8)(a)(1) of the Act.

In essence this is another case raising issues concerning arbitration policies that effect collective bargaining and representational rights related to *D. R. Horton, Inc*., 357 NLRB 2277 (2012), enf. denied in pertinent part 737 F.3d 344 (2013).

The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the two witnesses as they testified and I rely on those observations here. I have studied the whole record including the parties partial stipulated facts, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

The parties, on December 16, 2013, executed a partial stipulation of facts which contained a joint petition, to the court that in order to effectuate the purposes of the Act and avoid unnecessary costs and delay, and pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, that I decide this case partially on the stipulation. I accepted the partial stipulation of facts as a record exhibit and rely on the facts set forth there. The stipulated facts are:

> 1. All parties agree that the charge, the Complaint, the Amended Complaint and Notice of Hearing, the Answer to the Complaint, the Answer to the Amended Complaint and this Partial Stipulation of Facts, along with attached exhibits described herein, constitute most of the record in this case and that the balance of the record will be created at the hearing currently scheduled for December 16, 2013.
>
> 2. Upon a charge filed by Papke on June 13, 2013, and served on Respondent by regular mail on June 14, 2013, a copy of which is attached as Exhibit 1(a), and receipt of which is hereby acknowledged by Respondent, and upon an amended charge filed by Papke on August 14, 2013, and served on Respondent by regular mail on August 16, 2013, a copy of which is attached as Exhibit 1(b), and receipt of which is hereby acknowledged by Respondent, the Acting General Counsel of the Board, by the Regional Director for Region 21, acting pursuant to the authority

[1] I shall refer to counsel for the General Counsel as counsel for the Government and the General Counsel as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Company and shall refer to the Respondent as the Company. It is noted that in the parties partial stipulation of facts, set forth elsewhere here, the Company is referred to as the Respondent.

[3] I shall refer to the Charging Party as Charging Party Papke or Papke and counsel for the Charging Party as counsel for Papke or counsel for Charging Party Papke.

granted in Section 10(b) of the act, as amended, 29 U.S.C. Section 151, et seq., and Section 102.15 of the Board's Rules and Regulations, issued a Complaint and Notice of Hearing against Respondent on August 30, 2013, and the General Counsel of the Board, by the Region Director for Region 21, pursuant to the same authority issued an Amended Complaint and Notice of Hearing against Respondent on December 9, 2013, copies of which are attached as Exhibits 2(a) and 2(b). True copies of the Complaint and Notice of Hearing were duly served by certified mail upon Respondent and Papke on August 30, 2013. True copies of the Amended Complaint and Notice of Hearing were duly served by certified mail upon Respondent and Papke on December 9, 2013. An Answer to the Complaint, which was filed on September 13, 2013 was duly served on the Regional Director for Region 21 and Papke September 13, 2013. An Answer to the Complaint shall be filed and served prior to the December 16, 2013, hearing in this matter. Copies of the Answers are attached as Exhibits 3(a) and 3(b).

3. At all material times, Respondent has been a California corporation with an office and place of business in Irvine, California, where it has been engaged in the business of home loans.

4. Annually Respondent, in conducting its operations described above in paragraph 3, derives gross revenues in excess of $500,000, and performs services valued in excess of $50,000 in states other than the State of California.

5. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. About October 25, 2011, Papke signed an Employee Acknowledgement and Agreement (Agreement), a true copy of which is attached hereto as Exhibit 4.

7. About March 18, 2013, Papke filed a class-action complaint in the Orange County Superior Court in the case *Erik Papke v. Network Capital Funding Corp.,* Civil Case No. 30-2013–00638–457–CU–OE–CXC-alleging, *inter alia*, various violations of the California Labor Code. A true copy of this complaint is attached hereto as Exhibit 5.

8. About June 11, 2013, Respondent filed a Motion to Compel Arbitration on an Individual Basis, Strike the Class Allegations and Stay the Proceedings Pending Arbitration of Papke's suit described above at paragraph 7. A true copy of this motion, and the supporting Memorandum of Points and Authorities and declarations are attached hereto as Exhibit 6.

9. About June 19, 2013, Papke voluntarily filed a request for dismissal of the complaint described above in paragraph 7. That same day the complaint was dismissed. A copy of the request for dismissal and the order dismissing the complaint are attached as Exhibit 7.

10. About June 20, 2013, Papke filed a Demand for Arbitration Before JAMS of a class-action arbitration for various violations of the California Labor Code. Attached to the Demand was a class-action complaint nearly identical to the complaint filed in Orange County Superior Court that is described above in paragraph 7. A true copy of this arbitration demand and complaint are attached hereto as Exhibit 8.

11. About June 28, 2013, Respondent filed a Complaint for Declaratory and Injunctive Relief in the Orange County Superior Court, Case No. 30–2013–00659735 requesting that the Court decide that Papke's claims should proceed to arbitration on an individual basis, and not as a class action. A true copy of this complaint is attached hereto as Exhibit 9.

12. On October 10, 2013, the court granted Respondent's Motion for a Preliminary Injunction finding that Respondent cannot be forced to arbitrate the class action and that Papke's claims must proceed on an individual basis. A true copy of the court's order is attached as Exhibit 10.

13. On October 17, 2013, Papke appealed the court's October 10, 2013, order. The Notice of Appeal is attached as Exhibit 11.

14. General Counsel and Papke take the position that Respondent required Papke to sign the Agreement described above in paragraph 6 as a condition of his employment and that Respondent's enforcement of the Agreement requiring employees to arbitrate on an individual basis alleged violations of the California Labor Code precludes employees from engaging in conduct protected by Section 7 of the Act. Respondent takes the position that Papke was not required to sign the Agreement as a condition of his employment and that enforcement of the Agreement is not unlawful.

15. This Partial stipulation of Facts is made without prejudice to any objection that any party may have as to the materiality or relevance of any facts stated herein.

The Agreement Charging Party Papke executed on October 25, 2011, and which is referenced in and attached to the parties Partial Stipulation of Facts follows:

EMPLOYEE ACKNOWLEDGEMENT
AND AGREEMENT

This will acknowledge that I have received my copy of the Network Capital Funding Corporation Employee Handbook and that I will familiarize myself with its contents.

I understand that this handbook represents the current policies, regulations, and benefits of the Company. However, the Company retains the right to prospectively add, change, delete or modify policies, benefits, wages, and all other working conditions at any time (except as expressly set forth in the Employee Handbook and except for the policy of "at-will-employment" and the Arbitration Agreement below, which may not be changed, altered, revised or modified without a written agreement signed by both myself and the C.E.O. of the Company).

I further understand that nothing in the Employee Handbook creates or is intended to create a promise or representation of continued employment and that my employment, position, and compensation at the Company are at-will, and may be changed or terminated at the will of the Company. I understand that I have the right to termi-

nate my employment at any time, with or without cause or notice, and that the Company has a similar right. My signature below certifies that I understand the foregoing agreement that at-will status is the sole and entire agreement between the Company and myself concerning the duration of my employment and the circumstances under which my employment may be terminated. It supersedes all prior agreements, understandings, and representations (whether written or oral) concerning my employment with the Company.

I further agree and acknowledge that the Company and I will utilize binding arbitration to resolve all disputes that may arise out of or be related to my employment in any way. Both the Company and I agree that any claim, dispute, and/or controversy that either I may have against the Company (or its owners, directors, officers, managers, employees, agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, inconformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers; Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law. However, nothing herein shall prevent me from filing and pursing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). Further, this Agreement shall not prevent either me or the Company from obtaining provisional remedies to the extent permitted by Code of Civil Procedure Section 1281.8 either before the commencement of or during the arbitration process. In addition to any other requirements imposed by law, the arbitrator selected shall be a retired California Superior Court Judge, or otherwise qualified individual to whom the parties mutually agree, and shall be subject to disqualification on the same grounds as would apply to a judge of such court. All rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8 shall apply and be observed. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, motions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. I understand and agree to this binding arbitration provision, and both I and the Company give up our right to trial by jury of any claim I or the Company may have against each other.

This is the entire agreement between the Company and me regarding dispute resolution, the length of my employment, and the reasons for termination of employment, and this agreement supersedes any and all prior agreements regarding these issues. It is further agreed and understood that any agreement contrary to the foregoing must be entered into, in writing, by myself and the C.E.O. of the Company. No supervisor or representative of the Company, other than its C.E.O., has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing. Oral representations made before or after you are hired do not alter this Agreement.

If any term or provision, or portion of this Agreement is declared void or unenforceable it shall be severed and the remainder of this Agreement shall be enforceable.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGEMENT AND AGREEMENT.

/S/ Erik Papke
Print Full Name

/S/ Erik Papke
Signature

10/25/11
Date

[RETAIN IN EMPLOYEE PERSONNEL FILE]

The Government and Company each called a witness to expand upon the stipulated facts.

The Government called Charging Party Papke who testified

he attended an orientation meeting at the Company on October 25, 2011, along with eight or so others seeking employment as loan officers. The meeting was conducted by Company Trainer Steve Azizi (Azizi). Papke described the orientation; "There was a general overview and presentation of the underwriting system and just various—couple different systems the Company used for managing the loans and leads, and then at the conclusion we were given [by Azizi] paperwork to sign." Included in the paperwork were W–4, I–9 forms as well as a receipt for the Employee Handbook. According to Papke, Azizi told them they were "to complete the paper work and turn it back in," but said nothing else. Papke, and the others, completed the paperwork, turned it in, but, were not provided copies of what they had just signed. Papke stated Azizi made no mention of employees having a choice on whether to sign the forms; or, that the Company was ready and willing to negotiate the content and terms of any forms just signed; nor, was anything said about a willingness to add or subtract any part of the forms. Papke did not ask to negotiate about, add or delete, anything from or to the forms. Papke said Azizi did not ask if he had any questions about the forms nor did he or the others ask any questions.

Papke acknowledged signing the Agreement on October 25, 2011, and beginning work at the Company on January 3, 2012, as a loan officer/mortgage loan originator. Papke explained he, and the other 40[4] or so loan officers, accepted residential loan applications, qualified potential borrowers and presented borrowers with loan options and interest rates for their considerations.

Loan officers are paid on commission. Papke said he was in the top 10 percent fairly consistently. Papke resigned his employment on March 11, 2013, because the "work environment was not enjoyable, and the compensation had dropped considerably." Papke explained, "when my commission was reduced greatly . . . I pursued other opportunities."

On March 18, 2013, Papke filed his class action lawsuit in the Orange County Superior Court, *Erik Papke v. Network Capital Funding Corp.,* alleging various violations of the California Labor Code. Papke acknowledged that after the Company, on June 13, 2013, filed a response to his lawsuit, in which the Company sought to compel Papke and others to arbitrate their claims on an individual basis, Papke voluntarily moved to dismiss his March 18, 2013 lawsuit. However, on June 20, 2013, Papke filed a demand for arbitration before JAMS as a class action arbitration regarding various alleged violations of the California Labor Code.

Further related actions of the parties are fully set forth elsewhere here in the parties partial stipulation of facts and will not be repeated here.

Charging Party Papke, acknowledged on cross-examination, he never objected to signing the Agreement and first read the Agreement when it came to his attention, after he left his employment, that there was an agreement to arbitrate. Papke testified he did not know or realize that anything on the Agreement was optional and did not seek to negotiate any terms of the Agreement. Papke testified, on cross-examination, he never complained to the Company he believed his rights under the Board, or protected concerted activity, were being denied by the Company.

Human Resources Manager Christopher Bales (Manager Bales or Bales), who assumed his duties with the Company mid-October 2012, testified he is involved in the recruitment process including day-to-day duties such as hiring, reviewing employees' performance, and, when necessary terminations. Bales is involved with new hire orientations. All employees are provided a copy of the employee handbook orientation which handbook according to Bales, was redone in June 2013. The new handbook, with the revised Employment Acknowledgement and Agreement, utilized since June 2013, states in pertinent part as follows:

> I and the Company agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to my employment, including but not limited to the termination of my employment and my compensation. I and the Company each specifically waive and relinquish our respective rights to bring a claim against the other in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent me or the Company in a lawsuit against the other in a court of law. Both I and the Company agree that any claim, dispute, and/or controversy that I may have against the Company (or its owners, directors, officers, managers, employees, or agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act…. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law. . . .

Bales testified no employee ever refused to sign the Agreement. Bales testified Charging Party Papke never complained to him (Bales) at any time after he (Bales) became employed at the Company about the Agreement. Bales testified that while Papke was employed, the Company had no written or unwritten policy indicating that signing the Agreement was a condition of employment or that anyone refusing to sign the Agreement would suffer any adverse employment action. Bales acknowledged no employees were told they did not have to sign the Agreement; nor, were they told there would be no adverse consequences if they refused to sign the Agreement. Bales testified that at orientation employees were not told they had to sign the documents. Papke was never asked to sign the 2013 revised Agreement.

I turn to the issue of whether signing the Agreement was a mandatory condition of employment. Counsel for the Government stated during her opening at trial and asserts in her posttrial brief that the Company required Papke, on October 25, 2011, to execute, and accept, the Agreement as a condition of his employment.

The Company, contended at trial, and in its posttrial brief,

[4] The number of loan officers eventually grew to approximately 100.

there is nothing in the Company's hiring process that required Papke or any employee to sign the Agreement at any time, nor, is an employee prohibited from negotiating new or different terms of the Agreement.

Counsel for the Company notes a complete absence of evidence Papke ever complained about or objected to the Agreement and no showing he sought to negotiate new or different terms for the Agreement or to not sign the Agreement at all.

I find signing the Agreement was a condition of employment for Charging Party Papke and other employees. The facts establish Papke and others were presented a number of forms at the orientation held on October 25, 2011. Papke credibly testified Company Trainer Azizi, after giving the employees an overview of upcoming work, gave them W–4 and I–9 forms, as well as the employee handbook, which contained the two-page single spaced Agreement "to sign" and turn in to him. Papke credibly testified Azizi did not tell he or the others they had a choice to sign, or not sign, the forms, including the Agreement, nor, did Azizi say anything about a willingness on the part of the Company to negotiate individually with the employees the terms or language of the Agreement. Papke did not realize any portion of the Agreement was optional or negotiable.

The Company placed Trainer Azizi, at orientation, in a position from which employees could reasonably assume he spoke for the Company. Azizi gave the forms, including the Agreement, to the employees to complete, sign, and turn in to him (Azizi) and that is exactly what Papke and the others did. Papke, and the others, were never informed that any of the documents, specifically the Agreement, were voluntary, optional or that employees could, on an individual basis, negotiate different Agreement terms or simply decline to sign the forms at all.

It is unreasonable to conclude from the facts here, and I do not, that if any employee did not wish to sign the Agreement, he or she, could simply ask for the human resources director, or other representatives from that department, to negotiate new or different terms for the Agreement acceptable to each employee. Having individual employees negotiate terms and language of the Agreement could have resulted in possibly eight separate individual agreements between the Company and employees simply from those attending the October 25, 2011 orientation meeting. As loan officer numbers grew to approximately 100 there could then have been 100 separately negotiated Agreements. I find the Company cannot successfully contend signing the orientation forms were voluntary or negotiable based on the fact no employee sought, on an individual basis or otherwise, to negotiate different terms for the Agreement. Likewise, the Company cannot persuasively contend the orientation forms were voluntary, specifically the Agreement, based on the fact no employee complained about or sought to negotiate new or different terms with the human resources department during orientation. The fact Papke never read the Agreement before he signed it does not require a finding the Agreement was voluntary. Additionally, the fact Papke did not read the Agreement until after he had resigned his employment with the Company does not somehow cause his signing the Agreement to be voluntary. The Company never advised Papke, or the others, verbally or in writing, they did not have to sign the Agreement nor were the employees told there would be no adverse consequences if they refused to sign the orientation forms, specifically the Agreement. The fact Papke never complained about having to sign the Agreement, perhaps, only reflects he accepted the reality that if he wished to work for the Company he needed to sign the Agreement and other forms. The fact no employee has ever refused to sign the Agreement is strong evidence the employees have concluded it was, in fact, necessary for them to do so. The Company failed to demonstrate or establish signing the forms, including the Agreement, was voluntary on the part of the employees.

In summary on this issue, I am fully persuaded signing the Agreement was a term and condition of employment Papke, and the others, needed to accomplish in order to be employed at the Company.

I next turn to the issue of whether the allegations of the complaint are time barred. The Company contends the entire complaint should be dismissed because it is time barred by Section 10(b) of the Act in that the complaint is based on events that occurred outside the applicable limitations period. Section 10(b) of the Act in part provides ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charges with the Board . . . " It is undisputed Charging Party Papke signed the Agreement, at issue here, on October 25, 2011, well outside the 10(b) period. As noted elsewhere here the original charge was filed on June 13, 2013. It is alleged the Company, since about December 14, 2012, has maintained the Agreement, as a condition of employment, requiring its employees to utilize binding arbitration to resolve all disputes that may arise out of or be related to their employment. This allegation is within the 10(b) limitations period but, is it inescapably grounded in pre-10(b) events? It is not. The Company's June 11, 2013 filing of its Motion to Compel Arbitration on an Individual Basis, strike the class allegations, and, stay the proceeding pending arbitration of Papke's suit, *Erik Papke v. Network Capital Funding,* is clearly with the 10(b) limitation period. This enforcement action by the Company, based on Papke's signed Agreement, took place only 2 days before the charge here was filed. This action, by the Company, demonstrates it was enforcing the Agreement within the applicable time period.

On June 19, 2013, Papke voluntarily filed a request for dismissal of his March 18, 2013 class action lawsuit and the next day, June 20, 2013, filed a demand for arbitration before JAMS as a class action arbitration which was nearly identical to his court filed class action. The Company on June 28, 2013, sought to enforce Papke's October 25, 2011 signed Agreement, when it filed its complaint for declaratory and injunctive relief with the Orange County Superior Court requesting the Court decide that Papke's claims should proceed to arbitration only on an individual basis, and not as a class action. On October 10, 2013, the Court granted the Company's motion for a preliminary injunction finding the Company could not be forced to arbitrate on a class action basis but that Papke's claims must proceed on an individual basis.

I find the Company's 10(b) defense without merit. While it is clear Papke signed the Agreement on October 25, 2011, well outside the 10(b) period, the Company continued to maintain and enforce the Agreement well into the 10(b) period. The

Government's allegation the Company has, since December 14, 2012, a time within the 10(b) period, continued to maintain the Agreement is established. The Company's motion filing on June 11, 2013, a time clearly within the 10(b) period, was grounded on Papke's signed Agreement in which he agreed to arbitration on an individual basis. After Papke, on June 20, 2013, filed his demand for arbitration before JAMS, the Company, made responsive filings on June 28, 2013, seeking injunctive relief contending, in part, Papke's signed Agreement committed him to proceed on an individual basis and not as a class action arbitration. Again the Company continued to maintained and enforced the Agreement Papke signed on October 25, 2011, as a defense in his suit for class arbitration. In these circumstances, the date Papke signed the Agreement is not controlling or relevant. What is controlling and relevant is the Company continued to maintain and enforce Papke's Agreement within the 10(b) period. By continuing to maintain and enforce the Agreement within the 10(b) period establishes the conduct and action by the Company is not inescapably grounded in pre-10(b) events. The Board, in *Lafayette Park Hotel*, 326 NLRB 824 (1998), held an employer commits a continuing violation of Section 8(a)(1) of the Act throughout the period an unlawful rule, is maintained. Furthermore, the Board has held that where an employer, as here, enforces an unlawful rule during the 10(b) period it violates Section 8(a) (1) of the Act. Such is a continuing violation, see: *Teamsters Local 293 (R. L. Lipton Distributing),* 311 NLRB 538, 539 (1993). The continuing violation I find here precludes the Company from a valid 10(b) type defense.

Neither Papke's voluntarily filing his June 19, 2013 request to dismiss his class action lawsuit, or the fact he appealed the Superior Court's granting the Company a preliminary injunction forcing arbitration on an individual basis, does not require a different result than I reach here. The fact Papke obtained dismissal of his class action lawsuit and filed a class action arbitration does not somehow serve as a wavier of any rights afforded to him. In summary, the Company's 10(b) defense is without merit.

The Company, in its posttrial brief contends *D. R. Horton,* supra, is invalid because it was not decided by a quorum of at least three Board Members pursuant to 29 U.S.C. Section 153(b) and thus unconstitutional; citing *Noel Canning v. NLRB* 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (2013) and *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 218–221 (3d Cir. 2013). The Company notes Member Craig Becker was found to have been unlawfully appointed to the Board. The Company thus contends neither the Board as a whole, nor the delegated group that considered the *D. R. Horton* matter, satisfied the quorum requirements at the time the Board issued its decision. The Company notes that whenever the Board acts without a quorum or jurisdiction, its actions are invalid and unenforceable and the *D. R. Horton* decision is no longer controlling precedent. The Board has rejected similar contentions in numerous cases, see, e.g., *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013).

Furthermore, I note the Board now has a full complement of five members nominated by the President and confirmed by the Senate and could, if they deemed appropriate, reaffirm the earlier Board's actions. Consistent with Board precedent, I reject the Company's *Noel Canning,* supra, and *New Vista Nursing,* supra, defense.

The controlling issue here is whether the Company's Agreement (original and revised) contains restrictive provisions that violate Section 8(a)(1) of the Act.

The complaint alleges that since about December 14, 2012, the Company has maintained an Agreement for its employees which contains provisions that require employees to utilize binding arbitration to resolve all disputes that may arise out of or be related to their employment. Additionally, it is alleged that since June 11, 2013, the Company has sought to enforce the Agreement by filing a Motion to Compel Arbitration on an Individual Basis in a class action complaint filed against the Company by Charging Party Papke on March 18, 2013, in the case of *Erik Papke v. Network Capital Funding Corp.,* Case No. 30–2013–0063857–CV–OE–CXC in Superior Court of California, County of Orange.

In evaluating whether a rule applied to all employees, as a condition of continued employment, including the mandatory Agreement (original and revised) at issue here, violates Section 8(a)(1) of the Act, the Board, as noted in *D. R. Horton Inc.*, at 2280–2282, applies its test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U–Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). Pursuant to *Lutheran Heritage* the inquiry, or test to be applied, is whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful. If it does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or, (3) the rule has been applied to restrict the exercise of Section 7 rights.

While the Agreement here may not explicitly restrict protected activity, I am, however, fully persuaded, as explained below, a reasonable employee would, after the Company's responses to collective class, legal, or arbitration type actions, conclude the Agreement restricts employees ability to resolve, in concert, employment disputes protected by Section 7 of the Act.

Following the guidance set forth above, I now address whether the Agreement (original and revised), interferes with and restricts employees' from engaging in protected concerted conduct. Before doing so, however, I note two important findings by the Board in *D. R. Horton, Inc.* supra, namely, at slip op. 13 that an employer violates Section 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forms, arbitral and judicial," and at slip op. 10, "The right to engage in collective action-including legal action-is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal Labor policy rest."

Looking now at certain provisions of the Agreement it states in part; "I further agree and acknowledge that the Company and I will utilize binding arbitration to resolve all disputes that may arise out of or be related to my employment in any way. Both the Company and I agree that any claim dispute, and/or contro-

versy that either I may have against the Company . . . or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration. . . .” Portions of the Agreement also continue; “I understand and agree to this binding arbitration provision, and both I and the Company give up our right to trial by jury of any claim I or the Company may have against each other.” The Company by its actions clearly sought to have all employment related disputes raised by Papke resolved on an individual basis rather than as a collective action. In that regard the evidence establishes the Company sought to end Papke's March 18, 2013 collective court action when on June 11, 2013, it asked the court to end the class action and only allow the matter to advance on an individual basis in arbitration. After Papke obtained a dismissal of his lawsuit, and filed a demand for class arbitration, the Company filed a complaint for declaratory relief requesting Papke's class arbitration action be allowed to proceed only on an individual basis and not as a class action. The court granted the Company's request holding the Company could not be forced to a class action arbitration but proceed on an individual basis only. I find the Agreement, as enforced by the Company, to be unlawful because it prohibits its employees from exercising their Section 7 right to engage in concerted activity, which is a substantive right. Stated differently, the Company's enforcement of the Agreement prohibits employees from exercising their statutory right to engage in collective action regarding terms and conditions of their employment. There is nothing illegal or unlawful in requiring, by agreement, that employees' work related claims be submitted to final and binding arbitration but rather the illegality is established when it is required that all work related claims be arbitrated individually. I am not unmindful, the Agreement is silent on the issue of allowing class resolution of any claims subject to the Agreement, however, it is clear from the position and intent of the Company that Papke, and others, by signing the Agreement, agreed to arbitrate all disputes relating to employment exclusively on an individual basis.

In summary, the Agreement, as enforced, clearly inhibits and interferes with employees' Section 7 rights in that it requires employees to waive their right to engage in concerted activity for mutual aid and protection by prohibiting class or collective action in any forum.

The Company asks that I reject the Board's substantive analysis in *D. R. Horton* supra. In that regard the Company notes that three Federal Circuit Courts of Appeals, namely, *Owen v. Bristol Care Inc.,* 702 F.3d 1050, 1052–1055 (8th Cir. 2013); *Richards v. Ernest & Young* 734 F.3d 871, 873–874 (9th Cir. 2013), and, the direct appeal of *D. R. Horton; D. R. Horton v. NLRB,* 737 F.3d 344 (5th Cir. 2013), have reviewed the Board's *D. R. Horton* decision, and all three have rejected the Board's substantive analysis. I, however, am bound by Board precedent unless and until the Supreme Court or the Board directs otherwise. *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616 (1963). Neither has done so thus *D. R. Horton* is the applicable law here that I follow.

I find it appropriate to respond to other challenges the Company raises to *D. R.* Horton supra and I specifically reject such challenges. First, the Company challenges *D. R. Horton,* supra, because it is premised, in large part, on the Board's finding the Act provides employees an unwaivable substantive right to collective action or litigation. The Company contends the Supreme Court in *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1749 (2011), held the right to exercise class procedures is in fact waivable.

The Board in *D. R. Horton* considered the Supreme Court's holding in *AT&T Mobility LLC* and concluded that decision does not require a conclusion different from its holdings in *D. R. Horton.* Accordingly, I follow the Board's rational as set forth in *D. R. Horton and explained below;*

> A policy associated with the FAA and arguable in tension with the policies of the NLRA was explained by the Supreme Court in *AT&T Mobility v. Concepcion,* supra at 1748: The “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” The “switch form bilateral to class arbitration,” the Court stated, “sacrifices the principal advantage of arbitration–its informality.” Id. At 1750. But the weight of this countervailing consideration was considerably greater in the context of *AT&T Mobility* than it is here for several reasons. *AT&T Mobility* involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable. Here, in contrast, only agreements between employers and their own employees are at stake. As the Court pointed out in *AT&T Mobility*, such contracts of adhesion in the retail and services industries might cover “tens of thousands of potential claimants.” Id. at 1752. The average number of employees employed by a single employer, in contrast, is 20, [footnote omitted] and most class-wide employment litigation, like the case at issue here, involves only a specific subset of an employer's employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in *AT&T Mobility*–speed, cost, informality, and risk–when the class is so limited in size. 131 S.Ct. at 1751–1752. Moreover, the holding in this case covers only one type of contract, that between an employer and its covered employees, in contrast to the broad rule adopted by the California Supreme Court at issue in *AT&T Mobility*. Accordingly, any intrusion on the policies underlying the FAA is similarly limited.
>
> Thus, whether we consider the policies underlying the two statues as part of the balancing test required to determine if a term of a contract is against public policy and thus properly considered invalid under Section 2 of the FAA, or a part of the accommodation analysis required by *Southern Steamship, Morton*, and other Supreme Court precedent, our conclusion is the same: holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.

Next, the Company notes that in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012), the Supreme Court held

the Federal Arbitration Act (FAA) requires governing bodies to enforce arbitration agreements according to their terms, even if the claims at issue are Federal statutory claims, absent "a contrary congressional command." The Company here argues such a "command" does not exist in the NLRA and the Board has no authority to find the arbitration agreement here invalid.

CompuCredit Corp. v. Greenwood, supra, involved actions brought by consumers against the marketer of credit cards and the issuing bank alleging fees that were charged in connection with the credit cards violated the Federal Credit Repair Organization Act (CROA). The Court held that CROA provisions requiring credit repair organizations to disclose to consumers their right to sue for violations of CROA and prohibiting waiver of that right did not preclude enforcement of an arbitration agreement the parties had executed. The Supreme Court concluded the FAA required the parties' arbitration agreement to be enforced according to its terms. The Supreme Court specifically concluded that even when the claims at issue are Federal statutory claims, the FAA's mandate cannot be overridden unless "overridden by a contrary congressional command." The Company's defense based on *CompuCredit Corp.* fails. *CompuCredit Corp.*, in part, addresses consumer rights involving credit cards and fees related thereto, and has nothing to do with unilaterally imposed arbitration agreements in the context of employee-employer relationships. The case does not discuss how, if at all, the FAA may be applied to alter, by private arbitration agreements, the core substantive rights protected by the NLRA which are the foundation on which the NLRA and all Federal labor law rests, *D. R. Horton,* supra. Simply stated, an arbitration agreement that prospectively prohibits all class, collective and joint efforts by employees to obtain relief or redress for employment related concerns inhibits concerted activity protected by Section 7 of the Act, and violates Section 8(a)(1) of the Act.

Finally, I address the Company's contention the authority to prosecute class actions is not provided by the NLRA, but rather by the Federal Rules of Civil Procedure, Rule 23, and the collective action procedures of substantive labor laws. The Company notes that in *Deposit Guaranty National Bank v. Roper* 100 S.Ct. 1166 (1980), the Supreme Court held class action certification is a procedural right only, that is ancillary to the litigation of substantive claims and the Company contends that since it is a procedural right it is waivable. The Board addressed this issue in *D. R. Horton,* supra at 2285, and I am bound by the Board's conclusions. The Board's rational, binding here, in part states; "Any contention that the Section 7 right to bring a class or collective action is merely 'procedural' must fail." The Board continued, "The right to engage in collective action–including collective *legal* action–is the core substantive right protected by the NLRA . . ." The Board further noted, "Whether a class is certified depends on whether the requisites for certification under Rule 23 have been met." The Board considered the issue to be whether an employer may lawfully condition employment on employees' waiving their right under the NLRA to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23. The Board held, Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.

Simply stated the Company's contention that the authority to prosecute class actions under the NLRA may be waived has been rejected by the Board and binding here.

CONCLUSIONS OF LAW

1. The Company, Network Capital Funding Corporation, Irving, California is, and has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining a mandatory arbitration agreement, that waives the right of its employees to maintain class of collective actions in all forums, judicial or arbitral, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violates Section 8(a)(1) of the Act.

3. By enforcing the mandatory arbitration agreement on June 11, 2013, by asserting the provisions in litigation brought against the Company in *Erik Papke v. Network Capital Funding Corp.,* Case No. 30–2013–0063857-CU-OE-CXC the Company engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violates Section 8(a)(1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I shall recommend it cease and desist there from and take certain affirmative action designated to effectuate the policies of the Act.

I recommend the Company be ordered to rescind, modify, or revise its Agreement to clearly inform its employees the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and notify its employees the Agreement has been rescinded, modified, or revised and provide a copy of any modified or revised Agreement to all employees.

I recommend the Company be required to reimburse Charging Party Papke for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filings related to *Erik Papke v. Network Capital Funding Corporation et al.* in the Superior Court of California, Orange County. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Charging Party Papke shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010). This remedy is specifically to include any direct legal and other expenses incurred with respect to the Orange County Superior Court Order directing Papke and others to pursue their arbitration claims on an individual basis. See *Federal Security, Inc*., 359 NLRB No. 1, slip op. at 14 (2012).

I recommend the Company be required upon request, to file a joint motion with Charging Party Papke to vacate the Orange County Superior Court Order compelling arbitration on an individual basis which the Court issued on October 10, 2013. See *Federal Security Inc*., supra.

I lack authority to direct the Orange County Superior Court

to vacate its Order; however, the Government has other venues in which it may seek such relief.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Company, Network Capital Funding Corporation, Irvine, California, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement, that waives employees' right to maintain class or collective actions in all forums; whether arbitral or judicial.

(b) Seeking to enforce such agreement by filings in any court to compel individual arbitration pursuant to the terms of any such agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right under the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 7 calendar days after the Board enters its decision, and upon request of Charging Party Papke, file with the Superior Court of California, Orange County, a motion to vacate the Court's order compelling arbitration on an individual basis issued by the Court on October 10, 2013.

(b) Reimburse Charging Party Papke for any legal and related expenses incurred, todate and in the future, with respect to *Erik Papke v. Network Capital Funding Corporation et.al.*, with interest as described in the remedy section of this decision.

(c) Rescind, modify or revise the Agreement to ensure its employees the Agreement does not contain or constitute a waiver, in all forums, of their right to maintain employment-related class or collective actions.

(d) Notify its employees of the rescinded, modified, or revised Agreement and provide a copy of any modified or revised Agreement to each employee and notify each employee that the original Agreement has been removed from their personnel records and destroyed.

(e) Within 14 days after service by the Region, post at its Irvine, California facility, copies of the notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since June 11, 2013.

Dated at Washington, D.C. March 5, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce our Agreement that waives employees' right to maintain class or collective action in all forums, arbitral or judicial.

WE WILL NOT enforce, or attempt to enforce, any such agreement by filing petition(s) in any court to compel you to individually arbitrate your work related concerns.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL within 7 days after the Board Order and upon request of Charging Party Papke file a joint motion to vacate the Superior Court of California, Orange County, Order issued on October 10, 2013, compelling arbitration on an individual basis.

WE WILL reimburse Charging Party Papke any reasonable legal and other expenses incurred related to our various legal actions to compel arbitration on an individual basis, plus interest.

WE WILL rescind, modify, or revise our Agreement to make clear to our employees our Agreement does not constitute a waiver in all forums of your right to maintain employment-related class or collective actions.

WE WILL notify our employees we have rescinded, modified or revised our Agreement and provide each a copy of any revised or modified Agreement.

NETWORK CAPITAL FUNDING CORPORATION

[5] If no exceptions are filed provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 201.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."